OBEDIENCE TO ORDERS AS A DEFENSE TO A CRIMINAL ACT

A Thesis

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by

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SCOPE

A critical study of both international and American law with respect to the plea of superior orders as a defense to an otherwise criminal act, the possible effects of its treatment by the courts on military discipline and international law and order, and a proposal for a just treatment with respect to the plea.

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A. Introduction

The problem of whether a soldier's obedience to the orders of his superior, in the performance of an act which is, in and of itself, considered to be criminal,--whether the order and the obedience may constitute a defense available to the soldier should he be prosecuted for commission of the act by any court or tribunal--has long troubled thinking by legal scholars. A conflict arises in this area because of the apparent conflict of two important policies, each of which are believed to be beneficial within the community of mankind. One policy is that of discipline in the military forces; the other is that of adherence by members of the military to principles of international law. One would appear to require that subordinates always obey orders of their superiors; the other would seem to demand that a subordinate willfully disobey such an order if performance of the order would constitute the commission of what would be a crime in national or international law. The two extreme, opposite theories are described[1] as follows:

1. The doctrine of <u>respondeat superior</u> (so termed with emphasis on the lack of responsibility on the part of the subordinate rather than the responsibility of the

superior), or, as termed by the French, l'obeissance passive, according to which the soldier committing an offense in obedience to superior orders is relieved of responsibility automatically, without any qualification or condition. This view may seem to fit in well with the needs of discipline in the Armed Forces. Any armed force, by its very nature, requires discipline--that each subordinate obey the orders of his superiors. Such a principle is to be used, ultimately, to conduct men to battle, to lead them under fire to victory, and to impel them, if and when necessary, to sacrifice their lives for their country. The primary human instinct is that of self-preservation. But the soldier is required, as a part of his military discipline, to set aside this instinct in the interests of accomplishing the military objective, achieving victory in combat, preserving the lives of other soldiers, and protecting national security. Such discipline would seem, logically, to compel total and unqualified obedience without any hesitation or doubt, to orders in time of war and emergency, and complementary training and instruction in inculcating this principle of obedience in time of peace.[2] One may find, in the annals of military history, countless examples of the key role of military discipline in decisive campaigns and of the military disasters which resulted from the lack of it.

General Gunther Blumentritt, a high commander in the German Army in World War II with extensive experience on the Eastern Front has stated that Hitler's fanatical order [given in December, 1941, to the Wehrmacht before Moscow, with the temperature having fallen to minus 30 to 40 degrees centigrade and the great numbers of Russian and Siberian forces counterattacking] that the troops hold fast, regardless, in every position and in the most impossible circumstances, was undoubtedly correct. He must have instinctively realized that any retreat across the snow and ice must, within a few days, lead to the dissolution of the front and that if this happened the Wehrmacht would suffer the same fate that had befallen the Grand Armee of 1812. In the circumstances then prevailing the divisions could not have been withdrawn more than three to six miles a night. More could not have been asked of the troops or of the horses in their then exhausted condition. The withdrawal could only be carried out across the open country, since the roads and tracks were blocked with snow. After a few nights this would have proven too much for the troops, who would have simply lain down and died wherever they found themselves. There were no prepared positions in the rear into which they could have been withdrawn, nor any sort of line to which they could have held on.[3] Another German, a Wehrmacht doctor named Heinrich

Haape, recorded the events of this period before Moscow:

> In this unearthly cold, in which the breath froze and icicles hung from nostrils and eyelashes all day long, where thinking became an effort, the German soldiers fought--no longer for an ideal or an ideology, no longer for the Fatherland. They fought blindly without asking questions, without wanting to know what lay ahead of them. Habit and discipline kept them going; that and the flicker of an instinct to stay alive.[4]

While, fortunately for mankind, Hitler had not achieved his goals in this winter of 1941-42, the Germans were able to weather both cold and Russian winter counter-offensives. By spring, 1942, the Germans were able to return to the offensive. While history informs us of the ultimate outcome of their 1942 drive to Stalingrad, disastrous as it was for them in its aftermath, a closer look reveals their not unreasonable expectations of success at the beginning of the offensive.

On the other side of the coin, we can perceive what can happen in an army in which discipline is lacking by observing the performance of the French Army of 1940. In the darkness before dawn on 10 May, the German offensive was launched. Into the assault, the Germans threw 89 divisions, with 47 held in reserve, making a total of 136 divisions. Facing them were a total of 149 Allied divisions, 106 of them French, 20 Belgian, 13 British and 10 Dutch. By 21 May, with the Belgians and Dutch beaten, the Germans had

reached the Atlantic coast at Abbeville. The British Expeditionary Force, the French First and Seventh Armies, and the remaining Belgian Armies were encircled in Flanders. Though the German wedge had two exposed flanks, the French were unable to mount an armored thrust forceful enough to pierce them and re-establish contacts between the Allied armies in France and in Belgium. The French had no strategic reserve, they could not withdraw troops from the Maginot line, and their inadequate use of armor and shortage of airplanes left the corridor intact.[5] Furthermore, according to Mr. Rothberg the French did not have the morale and mentality to take the offensive. Hollowed out by internal dissension between Fascists and Communists at home, betrayed by Fifth Columnists and Nazi collaborators at every level of society from the lowest to the highest, weakened by a long winter of sitzkrieg, the French Army remained apathetic and Maginot-minded.[6] An incident which graphically portrays this sorry state of affairs is described by one who was there:

> The colonel asked me whether I would undertake to find my way back to the wood and guide both companies to the Ferme. I set out. Considering that the Germans seemed to be asleep and that the Mouchard (German reconnaissance plane) had gone home, I decided to avoid the woods and follow the main road straight through Chatillou. This road offered an amazing spectacle. Everywhere, I saw guns, knapsacks, tins of food, cartridge-cases in the ditch. Equipment worth hundreds of thousands of francs was strewn

along the road: no one thought of picking it up. All these things had become too heavy for infantrymen.

A short distance beyond Chatillou I met a soldier sitting on his knapsack and devouring a tin of meat.

'What regiment?" I asked him.

'48th Infantry'

'Where's your regiment?'

'Don't know.'

He quietly went on eating.

'Where are you going now?'

He looked sullenly ahead. He was a square-built, dark-haired fellow. His dark eyes had so dull a look that I thought: he wouldn't notice if a bullet hit him.

'Don't know,' he said at last. 'I'm looking for my regiment.'

I asked him whether they had been ordered to retreat.

'How do I know?' said the soldier. He rubbed his knee, adding, 'All of a sudden someone began to yell,--Sauve qui peut--and then we ran for it.'

'Were the Germans there?'

He reflected for a while.

'No, we didn't see any.'

He rose, looking at me with distrust.

'Let's go!'

He took his field flask and made ready to follow me.

'What about your gun?'

He cast a glance at his gun lying in a ditch --a farewell glance.

'Much too heavy,' he said. 'And rusty. Can't get it open. There's plenty of guns all over the place!'

He thrust his hands into his trouser pockets and bumped along by my side. But there was nothing unusual in his limp. All of us limped.

We came to a house where two shell-striken Negroes sat smoking. They belonged to the 24th Colonials. They joined us. They, too, were 'looking for their regiment.' One of them was a corporal and understood French. He asked me whether it would soon be 'over'. He, too, thought Germany hadn't done anything to him. I tried to explain to him that France was in danger. He didn't seem to understand.

'Hitler no come Senegal,' he kept repeating. He smiled, showing his teeth, and spoke at quick intervals to his comrade. 'Hitler no come Senegal. I no come Germany. I and Hitler no enemy.'

A stray German shall exploded a few yards ahead of us. We threw ourselves on the ground. The Senegal Negro--the one who did not speak French--shouted, 'Sauve qui peut.' 'It sounded like 'shof ki po.' He probably did not understand the meaning of his cry. He had heard it at a moment of great peril, and from that time on he repeated it whenever he thought himself in danger.

The Frenchman lay in the ditch beside me, the two Negroes about five steps from us. The sound of bursting shrapnel grew clearer and clearer, closer and closer. I lay on an abandoned knapsack. At every explosion, the Senegalese yelled, 'Shof ki po! Shof ki po!' Soon it began to sound like an Oriental prayer.

The Germans shortened their range. Now the shrapnel burst on the field to the right of us. Suddenly I heard an inhuman cry. It was one of the Negroes. The other, the black corporal,

threw himself sobbing and lamenting over his comrade. I crawled as close to them as I could. The Negro's whole back had been torn open by a shrapnel splinter.

He was the first dying man I saw at the front. His eyes were wide open, his mouth was foaming. His tongue, a thick black tongue, moved betweeh his lips. And, like a last wish or the name of someone he loved, he mumbled the words. 'Shof ki po! Shof ki po!'

Run for your lives! This was the slogan of the French Army. Run for your lives. Shof ki po.[6]

2. At the other extreme, we have the doctrine of absolute liability, or les baionettes intelligentes, in accordance with which a soldier must examine and weigh every superior order that is given to him. If it is an order to perform a criminal act, he must refuse to carry it out; and it is impossible to punish him for the refusal. If he obeys the order, he does so at his own risk. The fact of obedience to orders will not save him from criminal conviction.[7] This solution would appear to serve best the interests of international law in providing a deterrant to individuals, in order to prevent the commission of war crimes. One might argue that this would also benefit the soldier in a number of ways. For example, if his nation loses its conflict in which he is involved, he will not be so likely to find himself the subject of a war crimes prosecution conducted by a tribunal created after the fact by the vengeful victor

nations. Moreover, should there be those individuals in his own country's government who are more concerned, not only with international law, but with international publicity, and should these individuals be in positions sufficiently powerful to pressure the military into laying bare all the available facts of alleged war crimes; then the soldiers allegedly concerned would be in better legal positions when hailed before their own country's tribunals. Also, the effects of war crimes on a country's abilities to continue an all-out war then in progress cannot be discounted. Again, we may look to World War II for examples. When in June, 1941, the Wehrmacht invaded the Soviet Union, the invaders had been at first greeted as liberators in all of the areas invaded. In White Russia and the Ukraine, there were large scale desertions to the Germans. But the Nazis killed, tortured and starved hundreds of thousands--deserters, prisoners and populace alike. Germanic "Herrenvolk" attempts to enslave the Slavic "Untermenschen" swiftly alienated any who might have served the Germans. Ruthlessness and brutality ignited Russian resistance and they now fought against the invaders with the same cruelty and savagery as had been employed against them. Except for the Ukraine, there was no political collapse. Though there was political disaffection, Stalin's dictatorship held firm reins on the

people; and the rapid restoration in July of the political commissars in the Red Army reasserted Communist Party control there. But the thousands of torn-up Party cards lying in Moscow streets, when the Nazis were at the gates, were only one manifestation of hatred of the regime; and Stalin was shrewd enough to note it. Soviet propaganda immediately took advantage of the Russian's fierce love of his homeland, and a new note was struck: a great patriotic war in defense, not of Communism, but of Mother Russia.[8] One can only speculate on what might have happened had an enlightened German policy toward the Russian peoples followed the Panzers into the great Slavic heartland.

Further, soldiers who violate the law of war by raping, pillaging and shooting civilians at will, and are allowed to escape punishment merely because they were ordered to do so may prove to be undisciplined in combat. Disobedience to an illegal order of one's immediate superior may satisfy the expectations of those higher in the chain of command. One should not, for example, absolve the private for murdering his lieutenant merely because his corporal ordered him to do so.

3. To apply the doctrine of les baionettes intelligentes in dealing with soldiers accused of offenses perpetrated pursuant to orders of a superior may pose

a great problem to a soldier who has been given such an illegal order. If the order were obviously legal, then he must obey. If the order is patently illegal, then he must disobey or suffer the risk of prosecution--either by his own nation or, perhaps, by some vengeance-minded international tribunal in the future. But if he disobeys the order, he faces the prospect of a possible prosecution by his own nation for the disobedience. The problem is intensified in that gray area in which the soldier honestly does not know whether or not the order is legal. He is really placed in a quandry. He is then forced, perhaps in the heat of battle when his decision must be instantaneous, to act as judge and jury, i.e., finder of facts and interpreter of the law with respect to the order of his superior. This would be difficult enough if our soldier were a trained lawyer and judge--but he is much more likely to be a young man aged 18 to 20 years, with perhaps a high school education, if he is fortunate; or, perhaps, if less fortunate, a member of the Service by virtue of some social program (c.f., our own "Project One Hundred Thousand"), with an intelligence quotient of 67. He has--and rightfully so--been taught strict obedience to his superiors from his very earliest training, and, if fortunate, been taught obedience to authority from his babyhood. The purpose of this thesis is to discover and analyze the present law with

regard to the question.

In studying the treatment of the defense of superior orders, we can find great variances in its interpretation by national courts, both civilian and military, in the treatment of that country's own military personnel, and in the treatment of captured or surrendered enemy personnel. The human factor in the various courts is thus quite evident. We also find that most of the decisions take neither of the extreme views but fall somewhere in the broad spectrum in between.

After considering the various approaches which have been taken historically by the national and international tribunals, and the present day approaches to the problem, we shall consider what the writer believes to be the fairest, most just and most practical approach to dealing with the defense of superior orders. It is believed that this approach would best protect both the interests of military discipline and those of international law. This approach proposed a single test of whether or not there was knowledge on the part of the accused as to the illegality of the order. Such knowledge could be affirmatively shown by the prosecution, or inferred from all of the circumstances of the incident which gave rise to the action, and from considering the evidence of the background and capabilities of the accused individual himself.

B. The Historical Approach, Prior to World War II

1. In 1474, there occurred one of the earliest trials in which the defense of superior orders is recorded as having been asserted; this was the trial of Peter von Hagenbach. In 1469, the Archduke of Austria pledged his possessions on the Upper Rhine, including the fortified town of Breisach, to Duke Charles of Burgundy. Charles, so long as he held the pledged territories, was entitled to exercise there territorial jurisdiction, subject to the ancient liberties of the pledged towns and their inhabitants. Actually, Charles had no intentions of ever returning these places to the Archduke and set out on a determined policy of incorporating them into his Burgundian empire; he installed von Hagenbach as his Governor. Acting under the instructions of his master, von Hagenbach carried out a policy of arbitrariness and terror. The outrages were considered remarkable even by the standards of the fifteenth century, such that an alliance of Charles' neighbors was forged against him. Even before the war that followed, in which Charles was defeated, von Hagenbach was captured in a revolt by his German mercenaries in Breisach.

The Archduke ordered trial of von Hagenbach. Ordinarily, such a trial would have taken place in a local court. However, the Allies agreed on an ad hoc tribunal, consisting of twenty-eight judges. Eight of these were

nominated by Breisach, and two by each of the other allied Alsatian and Upper Rhenanian towns, Berne, a member of the Swiss Confederation, and Solothurn, allied with Berne. As Breisach's sovereign, Austria provided the presiding judge. The tribunal bore much of the appearance of an international one, in view of the quasi-independance of many of the various states of the Holy Roman Empire at that time. At the trial, von Hagenbach contended that he merely acted under the orders of his master, the Duke of Burgundy, and that the latter had subsequently confirmed and ratified all that had been done in his name. The Tribunal rejected the defense, stating that its acceptance would be contrary to the laws of God.[9]

2. In October, 1865, Henry Wirz, formerly a captain in the Confederate Army and Commandant of the prisoner-of-war camp at Andersonville, Georgia, from March, 1864 to April, 1865, when the war ended, was tried before a Military Commission in Washington, D.C. Captain Wirz was charged with conspiracy to maltreat some thirty thousand Federal prisoners held there and with thirteen specifications of murder in violation of the laws and customs of war. Captain Wirz, among other things, pleaded the defense of superior orders:

> I think I may also claim as a self-evident proposition, that if I, a subaltern officer, merely obeyed the legal orders of my superiors

in the discharge of my official duties, I cannot be held responsible for the motives which dictated such orders...[10]

The Judge Advocate admitted in his closing argument that the acts charged were done pursuant to superior orders:

> This prisoner is charged with the perpetration of offenses, many of them unknown to common or statute law, they were committed by a belligerent, in his own territory, in the exercise of a commission assigned him by the enemy, and in the execution of the orders of his superiors, given in violation of the laws of war.[11]

The theory of the Government's case was one of conspiracy between Wirz and his superiors, thus denying to him any defense of superior orders. The Judge Advocate argued for rejection of the defense of superior orders as having any efficacy:

> A superior officer cannot order a subordinate to do an illegal act, and if a subordinate obey such an order and disastrous consequences result, both the superior and the subordinate must answer for it.[12]

The Commission rejected this defense, convicted Wirz, and sentenced him to death. He was executed on 10 November 1865.

As in the von Hagenbach trial, one can easily note the spirit of vengeance in which the representatives of one of the partisans of a struggle presided in trial over one from the other side. The spirit of the times is revealed within the Judge Advocate's argument:

> The government he served never did and never can try him, no civil tribunal is possessed of the power; the duty then, as I think, devolves upon you /the members of the Commission/. But it is said the war is over, there is no longer any necessity for military tribunals, and however proper in times of war and public danger to assume the functions of civil courts, there is now no reason for doing so.
>
> If it were necessary, I would traverse the fact. The war is not over. True, the muskets of treason are stacked; the armies of rebellion are dissolved, some of the leaders are in exile, others are in prison; but by far the largest portion, sullen, silent, vengeful, stand ready to seize every opportunity to divide the loyal sentiment of the country and with spirit unbroken and defiant, would this day raise the standard of rebellion if they dared hope for success. This opinion of the war still existing is not mine alone. The Attorney General in his return to Judge Wylie's write of habeas corpus, issued for the surrender of the body of Mrs. Surratt /an alleged co-conspirator of John Wilkes Booth/, spoke of it in that sense.
>
> Congress, in many of its enactments provided for a state of war after a cessation of hostilities. The whole policy of the government towards the southern States sustains this idea.[13]

3. Another case which was tried amid the hatred of war, with nationals of one side sitting in judgment over one of the adversary was that of Captain Fryatt, who in 1915-16, was master of an unarmed British merchant vessel named the Brussels. In 1915, the British Admiralty promulgated directives ordering the merchantmen, under certain conditions, to attempt to ram enemy submarines. During that year, in such an encounter between the Brussels and a U-Boat, Fryatt ordered such a procedure. Although the U-Boat successfully

avoided the collision, the Brussels escaped. On a later occasion, however, she and her captain were captured by the Germans. In July, 1916, Fryatt was tried for having attempted to sink the submarine as a franc tireur without being a member of the combatant force. Despite his defense that he acted in compliance with the instructions of the Admiralty, the German court-martial convicted him and sentenced him to death.

It is debatable whether the instructions of the Admiralty were illegal under the laws of war. But even assuming they were, due to the divided opinion on the subject, Fryatt did not and could not have known that his act was unlawful. Hence, the German judges applied the doctrine of strict liability respect to superior orders to a somewhat doubtful case, with respect to actual illegality of the orders.

The cases just discussed concern instances in which individuals were tried by courts set up during or immediately following bitter hostilities, with the judges or members being of the side allegedly wronged. What happens when an individual is tried by the courts of his own nation for offenses allegedly committed pursuant to superior orders? The trials conducted in Leipzig, Germany, in 1921 can give us some indication.

The treaty of Versailles, signed on 28 June 1919,

provided that the Allies had the right to try Germans accused of war crimes in the First World War and that the German Government was obligated to surrender the persons demanded. Immediately after the treaty came into force, in January, 1920, the list of those demanded by the Allies was prepared and ultimately submitted to the Germans. That list was a long one. The German Government resisted the surrender of these persons as impracticable. To arrest all the men whose names were on the lists would be disastrous, the Germans contended, since there were included many men who were and always would be national heroes to their public and that to prosecute them might cause the Government to fall. The Allies, apparently not desiring this to come about, since the Weimar government had been fairly docile to their occupation, agreed to accept the offer by Germany to try a selected number of cases before a German Court. This arrangement was conditional, for the Allies retained the right, if necessary, to repudiate these German trials and demand the full execution of Article 228 of the Treaty.[14] The trials were conducted before the German Supreme Court (Reichsgericht) in Leipzig.

One of the trials was that of Private Robert Neumann, a guard at a prisoner of war camp, who was charged with maltreatment of certain prisoners. With

respect to certain incidents in which he allegedly applied severe physical force to break up the collective disobedience of prisoners in refusing to work, he invoked the defense of superior orders. The Court held that he could not be held responsible for those particular events. He was said to be covered by the order of his superior which he was bound to obey. The Court went on to say:

> ...A subordinate can only be held criminally responsible under such circumstances when he knows that his orders involve an act which is a civil or military crime. This was not the case here. Before the non-commissioned officer Trienke gave this order, he made telephone inquiries of the Commandant of the camp at Altdamm. Therefore, he himself clearly acted only upon the order of a superior.[15]

In the case of Karl Neumann, the accused had been a submarine commander. On 26 May 1917, his submarine, then under his command, sunk the British hospital ship, the Dover Castle; this was the incident for which he was charged. As a mitigating factor, all the survivors, which included nearly all persons aboard, were rescued. There was never any attempt to conceal the matter. The accused showed that the German Admiralty, finding that their enemies had, in violation of the laws of war, used their hospital ships for military purposes as well, gave notice of their prospective restriction of navigation of enemy hospital ships and that all such ships found in the Mediterrean and not abiding by the restrictions would be

regarded as vessels of war and dealt with accordingly. Karl Neumann pleaded that he had merely acted in compliance with these instructions. The Court found the accused to have been of the opinion, at the time of the incident, that the measures taken by the German Admiralty against enemy hospital ships were not contrary to international law, but were, insofar as he knew, legitimate reprisals. The Court first stated flatly that it was a military principle that the subordinate is bound to obey the orders of his superiors. As a consequence, when the execution of a service order involves an offense against the criminal law, the superior alone is responsible. This principle was said to apply in the case of the accused, thus absolving him. The Court went on to discuss what they considered to be the two exceptional situations to the principle of allowing the defense, under Section 47 of the German Military Penal Code. In these exceptions the Court stated that the subordinate could be punished. One was said to be that in which the accused had gone beyond the orders given him, a situation not found to be present in the case at hand. The other was said to be the case in which the subordinate would be liable to punishment as an accomplice when he <u>knows</u> that his superiors have ordered him to do acts which involve a civil or military crime or misdemeanor. The accused was found not to have

been within this exception.[16]

In the cases of Dithmar and Boldt, the two accused were officers aboard a German submarine commanded by one Patzig, an individual who was never found or brought to trial; the incident for which they were accused was the sinking of the Llandovery Castle, a British hospital ship, in the Atlantic. The restrictions applicable in the case of the Dover Castle were not here applicable. The Court found that Patzig acted against his orders in torpedoing the vessel. Throughout the incident and thereafter, Patzig took every action towards concealment of the affair. After the torpedoing was accomplished and it was ascertained that the vessel was sunk, the command "Ready for submerging" was given. The crew went below deck, leaving only the officers and the first boatswain's mate on the deck. Firing commenced some time afterwards. The accuseds, along with the others, acting pursuant to Patzig's orders, fired on the lifeboats and the persons within, killing many of them.

The Court found that a direct act of killing, following a deliberate intention to kill, had not been proved, and that Boldt and Dithmar were punishable only as accessories. They were thus convicted. The Court restated the general principle with respect to commission of a criminal act pursuant to superior orders. It then found an exception

to apply in the cases under consideration:

> However, the subordinate obeying such an order is liable to punishment, if it was known to him that the order of the superior involved the infringement of civil or military law. This applies in the case of the accused. Military subordinates are under no obligation to question the order of their superior officer, and they can count upon its legality. But no such confidence can be held to exist, if such an order is universally known to everybody, including also the accused, to be without any doubt whatever against the law. This happens only in rare and exceptional cases. But this case was precisely one of them, for in the present instance, it was perfectly clear to the accused that killing defenseless people in the life-boats could be nothing else but a breach of the law. As naval officers by profession, they were well aware, as the Naval Expert Saalwachter has strikingly stated, that one is not legally authorized to kill defenseless people. They quickly found out the facts by questioning the occupants in the boats when these were stopped. They could only have gathered, from the order given by Patzig, that he wished to make use of his subordinates to carry out a breach of the law. They should, therefore, have refused to obey. As they did not do so, they must be punished.
>
> If Patzig had been faced by refusal on the part of his subordinates, he would have been obliged to desist from his purpose, as then it would have been impossible for him to attain his object, namely, the concealment of the torpedoing of the 'Llandovery Castle.' This was also quite well known to the accused.[17]

In assessing the sentence, the Court recognized that the accuseds had acquired the habit of obedience to military authority and could not rid themselves of it, particularly in view of the fact that they were serving on board a submarine. In viewing all of the sentences,

even though they may appear to some to be overly lenient, one should keep in mind, according to the observations of the author, Mr. Mullins, that to the Germans a sentence of imprisonment upon an officer carried a special stigma and imported a blot upon the service to which he belonged, particularly when it was to be confinement in a civilian prison.[18] Moreover, the Court expressed a need to impose severity:

> A severe sentence must, however, be passed. The killing of defenseless shipwrecked people is an act in the highest degree contrary to ethical principles. It must also not be left out of consideration that the deed throws a dark shadow on the German fleet, and specially on the submarine weapon which did so much in the fight for the Fatherland. For this reason a sentence of four years' imprisonment on both the accused men has been considered appropriate.

Further, Dithmar, then at the time of the trial on active duty, was dismissed, and Boldt was deprived of the right to wear an officer's uniform.[19]

4. The author in his discussion of the results achieved at the Leipzig trials, includes some comments on the apparent interpretations, respectively, of the British, French and German military authorities with respect to the expected response of subordinates upon receipt of illegal orders, during his era. He opined that the Leipzig Court applied purely German law, which he found allowed only two exceptions to the principle which

we call that of respondeat superior, i.e., (1) if the subordinate has gone beyond the order given him, or (2) he knew that the order related to an act which involved a civil or military crime. French military law, according to Mullins, contented itself with asserting the duty of obedience, and no exceptions were made in the French code; it was not even provided, as in the German code, that subordinates in the military need not obey orders which were clearly illegal. On the other hand, the British Field Service Regulations then in effect provided that 'unexpected local circumstances' might render the orders given to a subordinate unsuitable or impracticable. A departure was authorized if the decision to disobey was based on some fact which could not be known to the officer who issued the order and if he were conscientiously satisfied that he was acting as his superior, if present, would have ordered him to act. Further, it was provided that if a subordinate, in the absence of a superior, neglected to depart from the letter of his orders when such departure was clearly demanded by the circumstances, he would be held responsible for such failure.[20]

Dinstein observes that the Leipzig Court, particularly in the Llandovery Castle case, applied the general rule of German national law, that a subordinate committing an offense pursuant to superior orders must be found to

have known full well the illicit character of the act which they had been ordered to perform, but further, that the Court went beyond the requirements of the Military Penal Code by supplementing the personal knowledge of the accused with universal knowledge on the illegality of the order.[21] Perhaps when formulating the exception, the Court had in mind a manifestly illegal order. However, the plain meaning of the Code, in the case in which a particular accused knew that an order was illegal, even though it was not manifestly so, is that the accused should be convicted if he received and executed the order. On the other hand, it is very difficult to ascertain what a particular person knew about an event at a time in the past. It would thus seem logical that the Court was applying the manifest illegality doctrine as an auxiliary test for the purpose of establishing the personal knowledge of the accused with regard to the illegality of the order. On the other hand, a rare case in which an accused could successfully prove that he was unaware of the illegality of the order, despite the fact that it was manifestly illegal, would probably have been decided in his favor. Hence, it might be said that under the German law of half a century ago, a subordinate committing a criminal act pursuant to superior orders would have a defense unless he knew that such obedience constituted commission of a crime,

civil or military, and further, that the Court might apply a test of manifest illegality in order to make a determination as to whether or not there was such personal knowledge.

It is interesting to compare the foregoing with the test set forth in Winthrop's Military Law and Precedents, Second Edition (1920), a work which is considered quite authoritative with respect to American military law of that period. Winthrop stated that if an act charged as an offense was done in obedience to an order, verbal or written, of a military superior there was generally a good defense at military law. However, the act must not have been either wanton or in excess of the authority or discretion conferred by the order. Further, the order must not have commanded a thing in itself unlawful or prohibited by law. For the inferior to assume to determine the question of lawfulness of an order given him by a superior would, of itself, as a general rule, amount to insubordination, and such an assumption carried into practice would subvert military discipline. Where the order was apparently regular and lawful on its face, the subordinate was, according to the author's interpretation of the then existing law, not to go behind it to satisfy himself that his superior had proceeded with authority, but was to obey it according to its terms, the only exceptions recognized being as follows:

....cases of orders so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness. Such would be a command to violate a specific law of the land or an established custom or written law of the military service, or an arbitrary command imposing an obligation not justified by law or usage, or a command to do a thing wholly irregular and improper given by a superior when incapacitated by intoxication or otherwise unable to perform his duty.

Except in such instances of palpable illegality, which must be of rare occurrence, the inferior should presume that the order was lawful and authorized and obey it accordingly and in obeying it he can scarcely fail to be held justified by a military court.

It may be added that an order which might not be regarded as legal in time of peace, may furnish to the inferior obeying it a complete defense in time of war, as being warranted by the laws and usages of war.[22]

It is interesting to note the similarities in Winthrop's view of American law at this point (with the apparent exception of the Wirz case) as compared to that rendered by the Leipzig Court; the difference being that in Winthrop's view, the manifest illegality test moves to the forefront as the sole determinant of whether or not the accused, if he has performed an illegal act pursuant to superior orders, can be convicted for the act.

Also to be considered as supporting the doctrine of respondeat superior is the case of the Casablanca Deserters. This case involved an arbitration between France and Germany before a panel of the Permanent Court of Arbitration;

it was decided in 1909. A Moroccan soldier employed at the German consulate in Casablanca had aided deserters from the French Foreign Legion in their flight. It was found by the Court that the accused had "acted only in accordance with orders from his superiors and, by reason of his inferior position, could not have incurred any personal responsibility."[23,24]

According to Dinstein, the main authority in international legal theory for the doctrine of respondeat superior, i.e., that the fact of obedience to superior orders constitutes a complete and absolute defense to a criminal prosecution, is to be found in Oppenheim's Treatise on International Law; the first edition, published in 1906, contained the following passage:

> Violations of rules regarding warfare are war crimes only when committed without an order of the belligerent Government concerned. If members of the armed forces commit violations by order of their Government, they are not war criminals and cannot be punished by the enemy; the latter can, however, resort to reprisals. In case members of forces commit violations ordered by their commanders, the members may not be punished, for the commanders are alone responsible, and the latter may, therefore, be punished as war criminals on their capture by the enemy.[25]

It was observed that a distinction was made between obedience to orders emanating from the Government and those of ordinary commanders. With respect to orders of the Government, discussion that a war crime had taken place appeared

to be out of place in his view. With respect to ordinary orders, a war crime might be committed; however, the commander was said to be solely responsible. The writer felt that the law could not require an individual to be punished for an act which he was compelled by law to commit. When the sixth edition was published, in 1940, having been revised by Lauterpacht, the original passage was altered as follows:

> The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander does not deprive the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. A different view has occasionally been adopted by writers, but it is difficult to regard it as expressing a sound legal principle.[26]

C. Obedience as a Defense in the World War II Setting

1. As will be noted infra, many of the defendants in the Nuremburg trials offered the defense of superior orders. But while the war was in progress, what was the attitude of the Nazi leaders with respect to accused Allied personnel who might have offered the same defense?

Early in 1944, certain Allied pilots who had participated in bombing raids on the German homeland were murdered by German mobs. On 28 May of that year, Herr Goebbels, who was Hitler's propaganda minister, wrote in the Volkischer Beobachter, the official Nazi publication:

> The pilots cannot validly claim that as soldiers they obeyed orders. No law of war provides that a soldier will remain unpunished for a hateful crime by referring to the orders of his superiors, if these orders are in striking opposition to all human ethics, to all international customs in the conduct of war.[27]

While the statement obviously cannot be equated with judicial pronouncements or the opinions of legal scholars, it does serve as an indication of official opinion.

2. During the war, plans were being made under the auspices of the Allies for dealing with Axis war criminals after hostilities. Lauterpacht, who had been responsible for the latest revision of Oppenheim's treatise and had reversed the position contained therein with respect to the defense of superior orders, made an important contribution to the deliberations of the commissions of the United Nations. In 1942, he submitted a memorandum to a Committee established by the International Commission for Penal Reconstruction and Development; the memorandum won approval, generally. Apparently rejecting both extremes with regard to plea of superior orders, he urged that the defense be available to the accused only if it were found that such accused had acted under compulsion or a legitimate mistake of law. Manifest illegality of the orders would preclude a defense to acts committed in obedience thereto.[28]

In 1943, another international body, the London International Assembly, which had been formed in 1941 under

the auspices of the League of Nations Union, although most of its members were appointed by governments of the United Nations, adopted a resolution which provided, with respect to the defense of superior orders, that the fact that an order was issued by a superior to a subordinate to commit an act violating international law was not in itself to be a defense, but that the courts were entitled to consider whether the accused was placed in a "state of compulsion" to act as ordered, and acquit him or mitigate the punishment accordingly. However, such exculpating or extenuating circumstances should, according to the resolution, in all cases be disregarded when the act was so obviously heinous that it could not be committed without revolting the conscience of an average human being. This resolution thus omits availability of the defense of mistake of law or fact.

In the United Nations War Crimes Commission, the question of obedience to orders was simultaneously explored by the Legal Committee, which attempted to attain an approximation of the relevant national laws of the United Nations in order that the same legal principle would be applied in the various national courts, and by the Committee on Enforcement, which was to draft a provision in a contemplated international Court of the United Nations for the punishment of war criminals. To the latter Committee, the

American delegate submitted the following draft provision:

> (1) The plea of superior orders shall not constitute a defense...if the order was so manifestly contrary to the laws of war that a person of ordinary sense and understanding would know or should know, given his rank or position and the circumstances of the case, that such an order was illegal.
>
> (2) It shall be for the Tribunal...to consider to what extent irresistible compulsion shall be a ground for mitigation of the penalty or for acquittal.[29]

This provision is couched more in traditional legal terms than that adopted by the London International Assembly and is strikingly similar to that discussed by Winthrop, in its first paragraph, but adding in the second paragraph the statement with respect to compulsion. The majority of the Legal Committee recommended a formulation similar to that found in the first paragraph of the American proposal. The Czech representative, however, contested the majority proposal and insisted on one very similar in content to the conception of the London International Assembly.

Before the Commission settled its position with regard to these recommendations of the majority and minority in the Legal Committee, the Committee on Enforcement put forward the proposal, accepted by the Commission, that the following statement be transmitted to the Governments of the United Nations for use by the international Court to be vested with the power to try war criminals:

> The Commission has considered the question of 'superior orders'. It finally decided to leave out any provision on the subject...The Commission considers that it is better to leave it to the court itself in each case to decide what weight should be attached to a plea of superior orders. But the Commission wants to make it clear that its members unanimously agree that in principle this plea does not of itself exonerate the offenders.

This statement was substantially the position adopted by the Commission in March, 1945.[30] Thus it appears that the only real position taken up to that point with respect to the validity of the defense of superior orders was a rejection of the principle of respondeat superior.

During the San Francisco Conference in April, 1945, the United States submitted a proposal to the Foreign Ministers of the United Kingdom, the Soviet Union and France, with respect to the trial of the major war criminals in Europe; it included a provision with respect to superior orders. In June, 1945, the provision, slightly revised, was included in a subsequent draft transmitted to the Embassies of those three powers in Washington to form a basis for discussion in a special conference to be convened. The proposal read as follows:

> In any trial before an International Military Tribunal the fact that a defendant acted pursuant to an order of a superior or government sanction shall not constitute a defense per se, but may be considered either

> in defense or in mitigation of punishment if the Tribunal determines that justice so requires.[31]

Thus, it would not have been sufficient under this formulation to prove to a tribunal that he had acted pursuant to superior orders, for such obedience would not constitute a defense per se. Further evidence as to the circumstances of the act for which he was accused would be necessary in order to determine whether justice, in that particular case, demanded acquittal or, in the alternative, a mitigation of the punishment.

On 6 June 1945, Mr. Justice Robert H. Jackson, American chief of counsel in the prosecution of the principal Axis war criminals, submitted a Report to then President Harry S. Truman, shedding some light on the thinking of the participants of the United States in the various international conferences, with respect to the defense of superior orders:

> There is doubtless a sphere in which the defense of obedience to superior orders should prevail. If a conscripted or enlisted soldier is put on a firing squad, he should not be held responsible for the validity of the sentence he carries out. But the case may be greatly altered where one has discretion because of rank or the latitude of his orders ....An accused should be allowed to show the facts about superior orders. The Tribunal can then determine whether they constitute a defense or merely extenuating circumstances, or perhaps carry no weight at all.[32]

3. The United States attitude towards the question

of obedience to orders as a defense was not acceptable to the Soviet Union. On the date when the revised draft was submitted, the Russians proposed to replace the American formula with one of their own:

> The fact that the accused acted under orders of his superior or his government will not be considered as justifying the guilt circumstance.[33]

This attitude is comparable to that later expressed by the Supreme National Tribunal of Poland, in 1946, where judgment was delivered a few months before the Nuremburg Judgment. It provides us with an indication of the attitude where the views of the Communist world hold sway, when dealing with their enemies.

An excerpt from the holding is as follows:

> According to the modern theory and practice of comparative penal law, it is not necessarily every order of a superior that the subordinate must carry out. In military law, among others that of Germany, obedience is the fundamental attitude of the soldier. Yet even in this rigorous military law, discipline and obedience are not to be conceived in the sense of a blind obedience...to every order, but only to orders that are in accordance with the law, and not those that call upon him to commit crimes. Any such criminal order from a superior will always constitute a crime, delictum sui generis, for the execution of which the doer will be equally responsible with the issuer of the order.[34]

Thus, it might seem that in the Communist world, the extreme principle of les baionnettes intelligentes was the prevailing one, during this period. But Greenspan tells us that under Soviet Russian military law, a soldier carrying

out the unlawful order of an officer incurs no responsibility for the crime, which is that of the officer, except where the soldier fulfills an order which is clearly criminal, in which case the soldier is responsible together with the officer who issued the order.[35]

It would appear that in the Communist world, or at least within the Soviet Union--unless, as is unlikely, there has been a great change in thinking in the subject in recent years--one finds a double standard. A different treatment may be anticipated with respect to the Russian soldier who commits an act, criminal but not clearly so, pursuant to the unlawful order of his superior, and the soldier of another nation, accused under the same or similar circumstances, and tried under Soviet auspices.

Eventually, the four Powers agreed on a "compromise", found in Article 8 of the Charter of the International Military Tribunal:

> The fact that the defendant acted pursuant to the order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.[36]

It is the opinion of the writer that the above provision represents a capitulation by the United States to the Soviet Union on this point, for we can perceive that <u>any</u> possibility of obedience to orders under <u>any</u> set

of circumstances, as a defense to a criminal act was precluded. Theoretically, the conscripted or enlisted soldier placed on the firing squad could be convicted of murder if the condemned person he assisted in executing were unjustly convicted. One can understand the vengeful attitudes which were held by the Russian people and their leaders in 1945, in view of the great hardships and sufferings imposed upon that unfortunate nation during the war. However, vengeance should never have been allowed by the American jurists to be substituted for a principle more nearly resembling justice under law.

4. At Nuremburg, more than twenty of the German leaders and a half dozen Nazi organizations were prosecuted in criminal proceedings by the Big Four. The trials began late in 1945 and were completed in the latter part of 1946, by the International Military Tribunal, which was composed of four judges and four alternates, one of each from each of the participating nations. The question of obedience to orders was raised many times. The best method of approaching an understanding of the law applied by the Tribunal would, it is submitted, be to examine the differing conceptions adopted by counsel for the prosecution and for the defense, to compare these with the provision of Article 8 of the Charter, and to consider the final position taken by the tribunal and the conclusions which arise from it.

The approach of Justice Jackson, the American chief prosecutor, varied from that of his colleagues from the other participating nations. In his opening speech, he reiterated the view expressed in his Report to the President of the United States, with respect to the soldier on the firing squad. However, this view had been superceded in the Charter by the major concession made to the Russians, leaving only the possible consideration of the matter of obedience in mitigation of the punishment. He even went so far as to quote the provision of the German Military Code which we have discussed in connection with the Leipzig Trials. However, he distinguished the situation of the soldier on the firing line with that of the defendants at bar, who were described as having been entrusted with broad discretion and the exercise of great power.[37]

The British chief prosecutor, Shawcross, in his closing speech, stressed that Article 8 was merely declaratory of existing international law, but spoke of it in terms of "orders manifestly contrary to the very law of nature from which international law has grown."[38] Menthon, the French chief prosecutor, cited the statement by Goebbels with respect to the lynching of the Allied pilots, quoted supra, as a principle to be turned around against the Nazis, but adding his own contribution, that orders from a superior do not exonerate the agent of a manifest crime from

responsibility.[39] Rudenko, the Soviet chief prosecutor, surprizingly enough, seemed to depart somewhat from the extreme position taken by his Government in participating in the formulation of Article 8, by stating in his closing speech:

> The authors of the Charter were fully aware of the specific conditions existing in Hitlerite Germany, were thoroughly familiar--from the material of the Kharkov and other trials--with the attempts of the defendants to hide behind Hitler's orders, and it is for this very reason that they made a special proviso to the effect that the execution of an obviously criminal order does not exonerate one from criminal responsibility.[40]

It would appear that in contrast to the absolute language of Article 8, the prosecutors were arguing that a defendant should incur responsibility for his acts if he obeyed manifestly illegal orders, but were implying that if the illegal orders were not manifestly so, the defendant must be relieved of responsibility. It might be argued that Article 8 was dealing with a state of affairs in which it was known in advance that the defendants, could not plead that they were unaware of the illegality of the acts which they performed pursuant to orders, and hence could not plead obedience to superior orders as a defense. Apparently, as reflected in his argument, at least one of the defense counsel--Kauffman, representing the accused Kallenbrunner--interpreted the

attitude of the prosecution to have been along this line.[41] However, another logical explanation for this tone in the approach of the prosecution is that the counsel felt that in all, or at least most of the cases, the state of the evidence was such that the manifest illegality of the acts charged was (or would be, referring to the opening speeches) apparent to the members of the Tribunal, and that it was preferable to the interests of the prosecution to rely on this showing of fact, rather than argue to the Tribunal an adherence to the more rigorous provisions of the Article and risk its rejection of them. Another possible explanation is that the prosecutors may have assumed that the orders obeyed in committing the crimes were not only illegal, but were manifestly so as a matter of law.

In attempting to absolve their clients of guilt and save them from hanging, the defense attorneys used various lines of defense. As a first line, they contended that Article 8 of the Charter was inapplicable to Hitler's orders, due to peculiar circumstances prevalent in the Third Reich. Many, however, in contrast to their colleagues, realized that this line of defense was vulnerable and put their main reliance on some other theory. Some of these admitted the general applicability of the principle set forth in Article 8 but attempted to show that their

particular clients should be acquitted for some other reason. Others merely attempted to plead for mitigation of punishment.

Kauffmann, representing Ernst Kaltenbrunner, apparently assumed that the Tribunal would be convinced of the manifest illegality and personal knowledge thereof on the part of his defendant, and offered the argument the element of compulsion, ignored by the prosecution, not as a defense but only for alleviation of punishment. There appeared to be no doubt, in his mind, that anyone refusing to comply with an order in the Third Reich, particularly toward the end of the war, would have been in peril of his life.[42] Sauter, counsel for Funk, argued that his client had obeyed not an ordinary order, to which he urged that the Article referred, but rather the law.[43] Nelte, counsel for Keitel, admitted that his client had acted in pursuance of manifestly illegal orders, and agreed that a soldier is not obliged to obey such orders, but sought to escape application of Article 8 by means of the plea based on the special nature of the Fuhrer's orders.[44] Thus, these counsel made no effort to contest the validity of Article 8, but either contented themselves with relying on the proviso dealing with mitigation of punishment, or with arguing that the offenses charged had been committed in obedience to

national law or orders of a special character.

Gawlik, counsel for the defense of the Sicherheitsdienst (Security Service), argued that if a person considers his action right and legal by virtue of an order given him, he must be exonerated, and further, that Article 8 of the Charter could only have that sense and meaning.[45] Kranzbuhler, counsel for Doenitz, also attempted a defense based on mistake of law. He contended that his client had obeyed Hitler's order to exterminate Commando prisoners of war, out of a belief that his acts constituted, as the order had represented itself to be, a measure of reprisal. However, he conceded that his client, like all senior officers, knew of the illegality of the order--in fact, the Geneva Convention explicitly prohibited the use of measures of reprisal against prisoners of war; hence, an argument based on mistake of law was untenable under these circumstances.[46]

Despite the plain meaning of Article 8 with respect to the doctrine of respondeat superior, several of the defense counsel relied on the doctrine as if it had been viable, recognized, and accepted, arguing the advantages of discipline and the shattering effects of insubordination on the whole structure of the military and the State. Several contended that the power to determine the legality of war is vested in the competent

political authorities and was not the affair of the armed forces. Exner, counsel for Jodl, argued that not even the Chief of the General Staff, in person, could refuse to comply with the resolve of the competent political leadership to wage war merely because in his opinion the war was in contravention of the rules of international law; otherwise no war--aggressive or defensive--could be waged. Furthermore, he put to the Tribunal the rhetorical question of what would happen if the Security Council of the United Nations decided on a punitive war or police action in response to aggression and the Commander in Chief of the United Nations forces were to refuse to implement the decision, alleging that to his mind no aggression justifying the countermeasure had taken place, and thus causing, as a result of such a principle, the whole security apparatus to depend on the subjective opinion of a single nonpolitical person. Exner and others argued that it was impossible to impose upon an officer the obligation to probe into the legality of wars for only seldom would he be in a position to discern all relevant circumstances so as to determine in accordance therewith whether war is permissible, and further, as a matter of law, the definition of aggression is disputable even among scholars versed in international law, and who would be the officer

to determine such a subtle question? The officer standing trial, they argued, is not a judge; he is not obliged, nor is he competent, to pronounce a verdict on the lawfulness of the policy of his country.[47] Exner argued that one should not demand from the soldier that he become a martyr as a result of such disobedience.[48]

Exner, in arguing for the doctrine of respondeat superior, attempted to distinguish the Nuremburg defendants from many of those tried by Nazi Tribunals for the 20 July 1944 attempt on the life of Hitler. Those had offered the same defense. He argued that those defendants had been given the extraordinary order to participate in the attempt to murder the head of the state, which he urged was distinguishable from an order from the head of state to commit an act contrary to international law. But in making such an argument, he, in effect, admitted that the doctrine of respondeat superior, as a defense in each and every case, would not apply, thus seriously weakening his position.[49] Naturally, the reliance of these gentlemen on the doctrine of respondeat superior was doomed from the start.

Another contention of the defense which should be discussed is that of the Fuhrerprinzip, or leadership principle. This principle was, according to the findings of the Tribunal, originally developed within the ranks

of the Nazi party and represented a most absolute form of government. Each leader had the right to govern, administer or decree, subject only to the orders he received from above. It applied, in the first instance, to Hitler himself as leader of the Party, and, in a lesser degree, to all other party officials. All members of the Party swore an oath of "eternal allegiance" to the Leader. Jahrreiss, counsel for Jodl, explained the theory, that Hitler's orders became the central element of the German state edifice. He described at great length the despotic-monocratic government in Nazi Germany, maintaining that such orders had been the last word, so that it was impossible to raise objections to them or call them in question. Hitler's orders had a special aura of sanctity, according to him. The functionaries had no right or duty to examine the orders. For them, the orders could never be illegal.[50] Laternser, counsel for the High Command, expressed the idea as follows:

> No one can deny that Hitler alone wielded the power of the Reich in his hands, and consequently also had the sole and total responsibility. The essence of every dictatorship ultimately lies in the fact that one man's will is almighty, that his will is decisive in all matters. In no other dictatorship was this principle developed so exclusively as in Hitler's dictatorship.[51]

The prosecution, with respect to the Fuhrerprinzip,

countered with an argument in the nature of the well-known legal principle of estoppel, i.e., that these particular defendants had participated in the destruction of free government in Germany, and should not be heard to complain of their lack of freedom of action. They, themselves, had helped to create the Fuhrerprinzip, and subsequently, to make to function officially. Had Germany won the war, they would have been quite prominent in attempting to share the credit and laurels for success of the Third Reich.[52]

The principal pronouncement of the Tribunal on the question of obedience to orders was included in the following passage, referring to Article 8:

> The provisions of this Article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.[53]

As might readily have been anticipated, there has been much speculation by legal scholars as to the interpretation, meaning and prospective application of this passage, particularly with respect to the test of moral choice, which cannot be found in the text of Article 8. Several schools of thought have developed concerning the

meaning and availability of the test. One view holds that the Tribunal applied the test to the question of mitigation of punishment only, in contradistinction to the question of discharge from responsibility; i.e., if moral choice was possible to the defendant who was faced with an illegal order and he committed the offense nevertheless, severe punishment ought to be meted out to him. On the other hand, if no such choice was open to the defendant when he committed the offense, there is room for leniency. Another, and possibly the majority view, is that obedience to orders is merely a fact to be taken into account in determining whether or not there was in fact a moral choice. Another, somewhat extreme view, is that obedience to orders does constitute a defense per se when no moral choice is possible. Dinstein, along with others, takes the view that the test relates to mens rea, the larger test which he urges in his work as the one most logical to follow in order to determine accountability. This principle would include compulsion and mistake of law or fact and would consider obedience to orders along with the other facts to be considered in arriving at a finding.[54]

5. Shortly after the Nuremburg trials, the Allied Powers in the Far East proceeded to try twenty-five Japanese leaders accused of war crimes. The International

Tribunal of the Far East, composed of eleven judges, heard the cases. It proceeded under a Charter attached to a Special Proclamation issued at Tokyo by General Douglas MacArthur as Supreme Commander. Article 6 of the Charter provided as follows:

> Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to the order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.[55]

In effect, the authors of the Tokyo Charter, absent the Soviet influences with regard to obedience to orders, adopted a position similar to that of the American Drafts of the London Charter. The Tribunal, however, felt constrained to follow the principles enunciated by the one at Nuremburg, including the passage relating to the moral choice test.[3] In his dissenting opinion, the Dutch judge, Roling, although he did not directly herein cope with the problem of obedience to orders, couched his decision in terms of <u>respondeat superior</u>:

> No soldier who merely executed government policy should be regarded as a criminal, as guilty of the crime against peace. The duty of an army is to be loyal. Soldiers nor sailors, generals nor admirals should be charged with the crime of initiating or waging an aggressive war, in case they merely

performed their military duty in fighting a war waged by their government.

He went on to explain that an army should not "meddle in politics" for better or for worse and must obey the instructions of the political leadership to go to war.[56]

6. Another group of trials conducted in the aftermath of World War II are the "Subsequent Proceedings" at Nuremburg, so-called to distinguish them from the proceedings, first in time and importance, before the International Military Tribunal. These subsequent proceedings involved twelve trials of some 185 important Nazi criminals and were conducted in the years 1946-1949 by the Military Government of the American Zone of Occupation of Germany--national, military tribunals. They were conducted under Law No. 10, promulgated on 20 December 1945, by the Control Council of the four Occupying Powers. Article II (4)(b) of the Law prescribed:

> The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.[57]

The plea of obedience to orders arose many times at the Subsequent Proceedings. The same contentions of the defense, which included many of the former defense counsel, were offered, invoking this principle in the various forms, along with a few new twists. The prosecution,

which also included some of the same counsel, offered arguments and contentions similar to those presented earlier, including those embracing the manifest illegality principle. In at least one case, there was added a reliance on the judgment rendered in the Llandovery Castle case at Leipzig. The prosecution also impliedly accepted compulsion as a possible defense but attempted to rule it out as inapplicable on the facts to the cases in question.

The Court rejected obedience to orders as a defense per se, but did not deny the possibility of discharge from responsibility under circumstances actually partaking of compulsion, i.e., where the defendants acted pursuant to orders associated with a threat which is "eminent, real and inevitable". The Tribunal stated:

> The test to be applied is whether the subordinate acted under coercion or whether he himself approved of the principle involved in the order. If the second proposition be true, the plea of superior orders fails. The doer may not plead innocence to a criminal act ordered by his superior if he is in accord with the principle and intent of the superior. When the will of the doer merges with the will of the superior in the execution of the illegal act, the doer may not plead duress under superior orders.[58]

Another principle which the Tribunal espoused was mistake of law, as stated in the Hostage case:

> We are of the view...that if the illegality of the order was not known to the inferior,

> and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists and the inferior will be protected.[59]

As a supplement to the personal knowledge principle, the Tribunal referred to the guilt of one committing an act pursuant to orders that were manifestly illegal. With respect to the issue of guilt or innocence, the Tribunal seemed to follow the earlier, international one in dealing with superior orders, with the few differences noted above. Dinstein, however, apparently detected a greater degree of acceptance of the principle as a factor in mitigation, based on some of the relatively light sentences adjudged and the remarks made by the Tribunal in connection therewith.[60]

Since the deliberations of the Tribunals at Nuremburg, there have been many trials of accused Nazi war criminals in the national courts of the aggrieved peoples of Europe. Records of 1,911 were submitted to the United Nations War Crimes Commission for publication, although the Commission epitomized only 89 of these. In the great majority of these in which the principle was invoked as a defense, it was rejected. A notable case was that of the Scuttled U-Boats case. There, a German naval officer was brought to trial before a British Military Court in Hamburg, in 1946, for having scuttled two German submarines

of a modern type after the surrender of the German armed forces in the theatre in which he served and in violation of the terms of the surrender. At the trial, the evidence showed that, at one point, the German Admiralty had ordered that all submarines be scuttled before they fell into the hands of the Allies. The order was countermanded immediately after its issue and before the acts giving rise to the proceedings. The accused had not, at that point, received notice of the revocation. Thus, his obedience defense was augmented by the mistake of fact. However, he did not rely on mistake of fact at all, and, in convicting him, the Court rejected his sole defense of superior orders.[61]

Another trial, perhaps the most famous of those conducted in a national court, was that of Adolf Eichmann, in the State of Israel. The accused sought to invoke the principle of superior orders, among others. This defense was rejected on the facts. It was found that the accused had himself formulated and ordered into execution much of the policy of annihilation of Jews for which he was accused. The Israeli Courts rendered dicta rejecting the principle of superior orders as a defense or, in his case, even as a mitigating factor. The applicable Israeli statutory provision included the manifest illegality test with respect to superior orders. Eichmann, it was stated,

did not meet that test.[62]

The United Nations International Law Commission has expressed a view with respect to the defense of superior orders. On 28 July 1954, the Draft Code of Offenses Against the Peace and Security of Mankind was adopted by the Commission. The Code stated that the offenses listed, which included various acts of aggression against nations, racial and religious groups and individuals, should constitute crimes under international law for which the responsible individuals should be punished. With respect to superior orders, Article 4 of the Draft Code provides as follows:

> The fact that a person charged with an offense defined in this code acted pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order.[63]

The provision does not spell out the meaning of "possible for him not to comply." One might speculate on a gamut of likely meanings and interpretations, requiring anything up to and including martyrdom on the part of the individual concerned in order for him to comply. Further criticism of the provisions is justified in that no provision is made with respect to knowledge, whether actual or inferred, of the illegality of the order on the part of the individual. An example of possible harshness of

this omission would be in a possible prosecution of an individual for causing "serious mental harm to members of a national, ethnic, racial or religious group," an "offense" proscribed by the code. How can any soldier, even a General, know whether or not he would be committing this particular offense in the mere carrying out of the routine duties of war?

D. The American View

1. We have previously alluded to the view on the doctrine of superior orders as enunciated in Winthrop's work, supra, and in the Wirz case. Further examination of American case law on the subject is of interest. In the case of In re Fair,[64] the defendants were given an order by their superior with respect to apprehension of two suspected deserters. They were to pursue the fugitives and if successful in sighting them, to halt them. If the deserters then did not halt, the pursuers were to make the demand the second time. If the demand were unheeded, according to the sergeant, they were to fire upon the fugitives and hit them. The pursuing soldiers overtook one of the fugitives and during the encounter, pursuant to the orders, shot him to death. On the issue of obedience to orders as a defense, the Court in granting the petition to dismiss on jurisdictional grounds, rendered the following dicta:

> While I do not say that the order given by Serg. Simpson to petitioners was in all particulars a lawful order, I do say that the illegality of the order, if illegal it was, was not so much so as to be apparent and palpable to the commonest understanding. If, then, the petitioners acted under such good faith, without any criminal intent, but with an honest purpose to perform a supposed duty, they are not liable to prosecution under the criminal laws of the state.[65]

In a state case involving labor disorders in the Pennsylvania anthracite coal region, the military forces of that state were called onto active duty by the Governor. The relator, a private, was a member of a unit sent into the troubled area. As a sentry at a particular house, he was given the order to halt all persons prowling around or approaching the house, and if persons so challenged failed to respond to the challenge after due warning "to shoot and shoot to kill". In compliance with these orders, the private killed a man. Although the Court found the order to have been a legal one under the circumstances, it made the following comments as to the defense of superior orders:

> ...if the circumstances are such that the command may be justifiable, he should not be held guilty for declining to decide that it is wrong with the responsibility unless the case is so plain as not to admit of a reasonable doubt. A soldier, consequently, runs little risk in obeying an order which a man of common sense so placed would regard as warranted by the circumstances.
>
> ...any order given by an officer to his

> private which does not expressly and clearly show on its face, or in the body thereof, its own illegality, the soldier would be bound to obey, and such order would be a protection to him.[66]

We may obtain some indication of the attitudes of two of the present Judges on the United States Court of Military Appeals as to the defense of superior orders by considering their opinions as stated in United States v. Miles.[67] In that case, the accused was convicted by a General Court Martial, on his plea of guilty, to, among other things, three specifications of housebreaking and two of wrongful appropriation of Government property. The offenses allegedly occurred at Fort Dix, New Jersey. During the sentencing procedure, the defense presented evidence which tended to show that the items in question, which were supply room items, had been taken by the accused, a private, in the housebreakings and brought to his company supply room to make up inventory shortages which had worried the company commander. The Court further inferred from the evidence that the accused had been told by the company commander to try to make up the shortage of specified items by "normal scrounging" activities. In the final argument on the sentence, one of the accused's civilian attorneys reviewed the evidence and maintained that statements made by the company commander and other personnel of the company "pushed [the accused] in the wrong

direction." However, in arguing for mitigation of punishment, counsel admitted the general guilt of the accused. The issue raised on appeal was that of whether the accused improvidently entered the pleas of guilty. It should be noted that at the trial, he was represented by appointed defense counsel and two civilian lawyers who were members of the bar of the State of New Jersey. Chief Judge Robert E. Quinn delivered the Opinion of the Court. He recognized the testimony of witnesses that, to them, "scrounging" entailed the exchange of surplus items for shortage items, or the voluntary transfer by one unit of a surplus item to another unit which had a shortage in that item, on a sort of "good will" basis or as a "gift". Such transfers were considered by the witnesses to be permissible supply practices but were sharply distinguished from illegal appropriations. Judge Quinn went on to state, with regard to the accused:

> Be that as it may, the plea of guilty admitted, and the accused does not now deny, that he knew he was engaged in illegal conduct when he broke into other buildings to obtain property, without regard to whether the property he took was or was not surplus to the units from which it was taken. If the accused acted in accordance with the terms of an order from his company commander which he knew to be illegal, he is nonetheless guilty of the offenses charged.[68]

We can, safely, only say that Chief Judge Quinn does not subscribe to the doctrine of respondeat superior

in its most extreme form, for he makes an exception in such instances, as did the Leipzig Court, in which the accused had personal knowledge that the order which he obeyed was illegal. His remarks, one could argue, indicate that he would accept the principle of superior orders as a defense per se--unlike the Nuremburg Tribunal and certain other courts--in some cases.

Judge Ferguson dissented with respect to the application of the Opinion of the Court, in this area, to the facts in the case at hand. He found an absence of mens rea, or specific intent, in the fact that the accused had acted pursuant to orders which may have seemed to him to have been legal. The opinion quoted at length the passages from Winthrop's work, which we have quoted, supra, placing emphasis on the following, which we repeat:

> Except in such instances of palpable illegality, which must be of rare occurrence, the inferior should presume that the order was lawful and authorized and obey it accordingly, and in obeying it he can scarcely fail to be held justified by a military court.

The Judge also quoted the early case of United States v. Clark, 31 Fed 710 (CC, E. Dist Mich., 1887), which, in turn, cited an even earlier Federal case:

> So in the case of McCall v. McDowell, 1 Abb (U.S.) 212, 218, it is said that 'except in a plain case of excess of

> authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the law should excuse the military subordinate when acting in obedience to the order of his commander. Otherwise he is placed in the dangerous dilemma of being liable in damages to third persons for obedience to an order, or to the loss of his commission and disgrace for disobedience thereto. ****The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in the Army. If every subordinate officer and soldier were at liberty to question the legality of the orders of the commander, and obey them or not as he may consider them valid or invalid, the camp would be turned into a debating school, where the precious moment of action would be wasted in wordy conflicts between the advocates of conflicting opinions.' It is true this was a civil case for false imprisonment, and these observations were made with reference to a question of malice which was material as bearing upon the plaintiff's right to punitive damages, as it is also a necessary ingredient in the definition of murder. /United States v. Clark, supra, at page 716./

Judge Ferguson goes on to make his own observation with respect to the defense of superior orders and its application to the case at hand:

> The reasoning of the foregoing authorities is persuasive of the validity of the defense of obedience to superior orders under the limitations which are set forth. Not only is immediate, unquestioning compliance with orders necessary to the maintenance of military discipline, but its existence is inconsistent with the guilty mind which has heretofore been deemed so necessary to support a criminal conviction....Thus the author of the opinion

> in United States v. Clark, supra, adverted to its importance in resolving the question whether a member of the armed forces acted maliciously in killing an escaped prisoner. In like manner, its existence does away with the mens rea required for the offenses of wrongful appropriation and housebreaking as depicted in this record. While an order to break, enter, and steal from the home of a private citizen might be considered palpably illegal and of no consequence in defense of the individual executing its terms, that is not the situation with which we are confronted. In this case, the accused was ordered to remove Government owned property from Government owned buildings and to deliver it to another Government building for the use of the same Government. To expect him, under such circumstances, to contest the validity of his superior's command is to place upon the shoulders of a private soldier a most unconscionable burden.[69]

Thus it would appear that in a case in which the plea of superior orders was offered as a defense, Judge Ferguson would demand an objective requirement that palpable illegality be found in the orders given in order to reject the plea, as the only alternative to a finding of actual knowledge in the accused of the illegality of the order.

The foregoing case was cited in United States v. Figueroa,[70] in a case in which the accused, charged with larceny of Government property and its wrongful sale to Vietnamese national. The accused, a staff sergeant, stated that he had not realized any personal profits from his acts but had merely obeyed the orders of his superior, a warrant officer. The Court rejected the contention at the appellate

level that the guilty pleas were improvident:

> ...that the accused acted in obedience to an order from his superior which he knew to be illegal, or which a man of ordinary sense and understanding would know to be illegal, is no defense to a prosecution based upon the actions ordered....The record of the out-of-court hearing and the defense evidence herein afford ample indication that appellant actually was aware that Warrant Officer Payne's orders to him to take Government property and sell it to Vietnamese nationals was illegal, and certainly he should have been so aware. Thus there is no basis in the record for this defense.[71]

Here, the Board of Review held forth two alternative tests for holding a subordinate responsible in an obedience to illegal orders, i.e., a subjective test of personal knowledge of the illegality, which was apparently that actually used in this case, or an objective test, that of the knowledge of a man of ordinary sense and understanding. The same language also appears in United States v. Griffen.[72] The latter test appears to be more stringent from the standpoint of the accused than the one for which Judge Ferguson contended, supra, based on his interpretations of former case law and scholarly comment, but was the one then contained in the Manual for Courts Martial.[73]

An earlier Board of Review decision, found in United States v. Kinder,[74] spoke in terms similar to those later used by Judge Ferguson. In that case, an

Airman First Class, during the Korean hostilities, was ordered by a lieutenant to kill a Korean intruder whom he had apprehended in the vicinity of an ammunition dump. The accused pleaded the defense of superior orders. The Board of Review, citing many of the authorities discussed herein, supra, held that the contention was correctly rejected by the trial court:

> It is the heart of the principle of law contained in provision of the Manual for Courts-Martial../see ftnt 61, supra/...and other military and civil authorities cited to the same effect, supra, that a soldier or airman is not an automaton but a 'reasoning agent' who is under a duty to exercise judgment in obeying the orders of a superior officer to the extent, that where such orders are manifestly beyond the scope of the issuing officer's authority and are so palpably illegal on their face that a man of ordinary sense and understanding would know them to be illegal, then the fact of obedience to the order of a superior officer will not protect a soldier for acts committed pursuant to such illegal orders.[75]

In United States v. Schultz, the accused was convicted of murder. It was found that while on a patrol, he had entered a Vietnamese family dwelling, forced his victim outside, and fatally shot him through the head. The victim and his family were unarmed. At the trial, the law officer denied the request of the defense that he give the court an instruction on the defense of superior orders. The Court of Military Appeals affirmed, holding that the issuance or execution of an order to kill under

the circumstances of the case would have been unjustifiable under the laws of this nation, the principles of international law, or the laws of land warfare. Such an order, reasoned the Court, would have been beyond the scope of authority for a superior to give and would have been palpably unlawful. Thus the Court, in effect, stated that a law officer or military judge could determine palpable illegality of any order in question in a court, as a matter of law.[76] This would deny the accused any possibility whatsoever of reliance on a defense of superior orders. A similar ruling was made in United States v. Griffen,[77] supra, by an Army Board of Review.

The Supreme Court of the United States has not as yet offered a clear-cut formula with respect to the defense of superior orders. In an early case, Wilkes v. Dinsman,[78] the Court found an immunity in public officers' acting within their scope of authority and not influenced by malice, corruption or cruelty. It went on to state, referring to a United States Marine officer on shipboard duty on the open seas, responsible for many lives and his country's respectability:

> In such a critical position, his reasons for action, one way or another, are often the fruits of his own observation, and not susceptible of technical proof on his part. No review of his decisions, if within his jurisdiction, is conferred by law on either courts, or juries, or subordinates, and, as this court

held in another case, it sometimes happens that 'a prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object.' While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the fact upon which the commander exercises the right to demand their services, the hostile enterprise may be accomplished without resistance.[79]

The Court went on to discuss a prima facie legality of such official actions until such is disproved by the opposite party.

In the case entitled In re Yamashita,[80] the Court found jurisdiction in a United States military tribunal to try General Tomoyuki Yamashita, Japanese Commander of an Army Group in the Philippine Islands In World War II for unlawful breach of duty in permitting members of his command to commit certain alleged extensive and widespread atrocities on the civilian population and prisoners of war. The Decision of the Court made no mention of the defense of superior orders. Mr. Justice Murphy, in his dissenting opinion, stated that the accused should not have been held responsible for excesses committed by his disorganized troops while under attack. He then, in dicta, in connection therewith, discussed the principle of superior orders, quoting a 1944 change to the 1940 War Department Field Manual,[89] then in effect:

Individuals and organizations who violate the accepted laws and customs of war may be

> punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment. The person giving such orders may also be punished.[82]

While it may be argued that Mr. Justice Murphy was more concerned with the other issues of the case and was not then devoting much real attention to the superior orders question, a better statement is that we have a pronouncement by one then Justice on the United States Supreme Court that obedience to orders can, in some circumstances, be a complete defense to an act committed pursuant to such orders.

Considering present American military doctrine concerning the defense of superiors, we have several official published statements of doctrine. The present Manual for Courts Martial contains the following, in the paragraph on special defenses:

> An order requiring the performance of a military duty may be inferred to be legal. An act performed manifestly beyond the scope of authority, or pursuant to an order that a man of ordinary sense and understanding would know it to be illegal, or in a wanton manner in the discharge of a lawful duty, is not excusable.[83]

The current Department of the Army Field Manual contains the following with respect to the defense of superior orders:

> The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases in which the order is held not to constitute a defense to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.
>
> In considering the question whether a superior order constitutes a valid defense, the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received; that certain rules of warfare may be controversial; or that an act otherwise amounting to a war crime may be done in obedience to orders conceived as a measure of reprisal. At the same time it must be borne in mind that members of the armed forces are bound to obey only lawful orders.[84]

2. Currently, at the time of this writing, there are in progress criminal prosecutions against members of the United States Army for alleged atrocities committed against Vietnamese nationals under conditions of hostilities. These are known as the "My Lai Trials". The issue of superior orders has been, or is expected to be raised by the defense in the trials. The U.S. Army Judiciary, Office of the Judge Advocate General, with the assistance of the Judge Advocate General's School, U.S. Army, has

promulgated suggested model instructions for use by the military judges to the members of the courts. These may well be considered at the appropriate time in the cases that are in progress or that will be tried in the future. With respect to such orders as were determined by the ruling of the Military Judge or by determination of the Court to have been unlawful, the following is included:

> My ruling (your determination) that the order issued by _____ was unlawful does not in itself determine whether or not the accused is criminally responsible for acts done in compliance with that order. Acts of a subordinate, in compliance with his supposed duty...are justifiable or excusable and impose no criminal liability, unless the superior's order is plainly unlawful (or unless the accused knew the order to be unlawful).
>
> An order is 'plainly unlawful' if, under the same or similar circumstances, a person of ordinary sense and understanding would know it to be unlawful.

In only those instances in which there is no evidence tending to show actual knowledge by the accused of the illegality of the order, the following is used:

> The burden is on the prosecution to establish the guilt of the accused by legal and competent evidence beyond a reasonable doubt. Consequently, unless you are satisfied beyond a reasonable doubt that the order given to the accused in this case was plainly unlawful, as I have defined the term, you must acquit the accused.

On the other hand, if the direct or circumstantial

evidence tends to show that the accused did have actual knowledge of the illegality of the order, the following additional instruction is suggested:

> A subordinate is not criminally liable for acts done in obedience of an unlawful order which is not plainly unlawful on its face, unless the subordinate had actual knowledge of the unlawfulness of the order. In the absence of such knowledge the subordinate must be considered duty bound to obey the order and he cannot properly be held criminally accountable for acts done in obedience to what he supposed to be a lawful order.
>
> If you are not satisfied beyond a reasonable doubt that the order was plainly unlawful, as I have defined the term, you must acquit the accused of any specification alleging acts done in compliance with that order, unless you are satisfied beyond a reasonable doubt that the accused had actual knowledge (that the order was unlawful) (or) (that obedience of that order would result in the commission of a criminal act).

The following instruction is the one that pertains to proof of knowledge by circumstantial evidence:

> Knowledge on the part of the accused, like any other fact may be proved by circumstantial evidence, that is, by evidence of facts from which it may be justifiably inferred that the accused had such knowledge. In this regard you may consider all relevant facts and circumstances including but not limited to (specify significant evidentiary factors bearing upon knowledge, including the accused's age, education, experience, training and opportunity to know relevant facts). The weight, if any, to be given an inference of the accused's knowledge must, of course, depend upon the circumstances attending the proved facts which give rise to the inference, as well as all the other evidence in the case.

It is for you to make this determination.

The burden is on the prosecution to establish the guilt of the accused by legal and competent evidence beyond a reasonable doubt. Consequently, you must acquit the accused of any offense committed in obedience to an unlawful order unless you are satisfied by the legal and competent evidence, beyond a reasonable doubt either that:

(a) The order is plainly unlawful; that is that a person of ordinary sense and understanding under the same or similar circumstances would know it to be unlawful or that

(b) The accused knew at the time of his act that the order given him to _____ was unlawful under the circumstances.

In one "My Lai" case recently completed, that of United States v. Hutto, which resulted in an acquittal as to all charges and specifications, the following instruction with respect to the plea of superior orders was given to the court by Colonel Kenneth A. Howard, the presiding Military Judge:

DEFENSE OF OBEDIENCE TO ORDERS

Gentlemen, evidence has been introduced that either Captain Medina at a briefing on 14 March 1968, or some other authority higher than the accused as the 2d Platoon was moving into the hamlet of My Lai 4 on the morning of 16 March 1968, or both of these authorities, gave an order to kill all living things in the village of My Lai 4, to include all inhabitants and all animals, as well as to burn the buildings, pollute the water and destroy the crops.

You are advised that under the existing law of war, the armed forces of the belligerent parties (in the case of the undeclared war in the Republic of Viet Nam, this would be the

forces of the Republic of Viet Nam and their allies, in opposition to the Viet Cong and their allies): restating, that under existing law, the armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture both (that is combatants and non-combatants) have the right to be treated as prisoners of war.

Further you are advised that the existing law of war establishes that should any doubt arise as to whether persons, having committed any belligerent acts and having fallen into the hands of the enemy, doubt as to whether in this case they were or might be NVA, VC, NVA or VC suspects or sympathizers, if any of these persons falling into the hands of U.S. Forces, after having committed any belligerent acts, such persons shall enjoy the protection of the Geneva conventions until such time as their status has been determined by a competent tribunal.

Further you are advised that the existing law of war forbids any unlawful act by agents of the detaining power causing the death of a prisoner.

The existing law of war also provides, as pertinent to this case, that such persons under definite suspicion of hostile activities to the security of a party to the conflict shall nevertheless be treated with humanity.

You are hereby advised that, under the facts standing before this court, that order, from whatever source, if in fact there was such an order, was <u>unlawful</u>.

However, the determination by the military judge that, as a matter of law, that order was illegal, does not resolve the issue here presented by the evidence for your consideration, that is, whether or not the accused, Sgt. Hutto, was justified in his actions because he acted in obedience to orders. You must resolve from the evidence and the law whether or not the order as allegedly given

was manifestly illegal on its face, or if you are not satisfied beyond a reasonable doubt that the alleged order was manifestly illegal on its face, whether or not the order, even though illegal, as I have ruled it was, was known to the accused, Sgt. Hutto to be illegal or that by carrying out the alleged order Sgt. Hutto knew he was committing an illegal and criminal act.

In determining the issue of obedience to orders, you are further advised that an enlisted member, the same as any other member of the United States Army is not and may not be considered, short of insanity, an automaton, but may be inferred to be a reasoning agent who is under a duty to exercise moral judgement in obeying the orders of a superior officer.

Considering the just recited principles of law, you are advised that an order is lawful if it relates to military duty and is one which does not exceed the authority of the superior giving such order, or in other words, is an order which the superior is authorized to give the accused. It is unlawful if it directs the commission of a crime under United States law or under the law of war. For example under the Hague Regulations of 1907, it is forbidden to deny quarter. This means that it is unlawful to attack enemy personnel who have laid down their arms or are otherwise unarmed and manifest an intent to surrender. As applied to this case an order to attack and kill armed enemy personnel in battle is lawful. But it is unlawful to order the killing of enemy troops who have laid down their arms, or belligerents who are unarmed where either category indicates an intent to surrender or are passively in the control of U.S. troops are prisoners, offering no resistance.

As I previously indicated, my ruling that the order issued by Captain Medina or other higher authority was unlawful does not in itself determine whether or not the accused is criminally responsible for acts done in

compliance with that order. Acts of a subordinate in compliance with his supposed duty or orders are justifiable or excusable and impose no criminal liability, unless the superior's order is manifestly unlawful or unless the accused knew the order to be unlawful or that by carrying out the order the accused knew he was committing an illegal and criminal act.

In this regard, an order is "manifestly unlawful, if under the same or similar circumstances, a person of ordinary sense and understanding would know it to be unlawful. I have stated under the same or similar circumstances I intend here to summarize evidence offered by both sides as indicative of the circumstances under which the incident occurred. However, it is not my recollection of the circumstances that governs your determination, but it is your own independent recollection of the evidence that you must rely upon determining the facts of the case.

There has been evidence offered tending to indicate that during the months from November 1967 til March 16, 1968, Company C of the 1st of the 20th Infantry had encountered the enemy, suffering casualties but without a face to face encounter. Sniper fire, booby traps and mines apparently controlled by enemy forces operating out of the "Pinksville" area which included the Hamlet of My Lai 4, had inflicted injuries and death upon the members of Company C. Because the Pinksville area was an area denied to American forces prior to March 16, 1968, the American forces were denied the satisfaction of a face to face encounter in force with the enemy. On March 15, 1968, a memorial service was held for C Company personnel killed in the recent past and immediately after that service, all company personnel were briefed on an operation to be conducted on the following day in the My Lai 4 area, a free fire zone and an area previously denied to C Company. At this

briefing, an order allegedly was given to kill every living thing and destroy the village. It was either stated or clearly implied that this operation would finally allow C Company personnel to get even with their harrassors. On the morning of the operation, artillery fire and gun ships prepped the area intending to clear the landing zone and adjacent areas of resistance. When the troops of C Company landed in the LZ, they formed on line and on order moved forward into the village laying down a suppressive fire. The members of C Company were informed prior to the operation that all civilians and other non-combatants had been warned and it was stated that civilians had cleared the village. The members of C Company were also informed that My Lai 4 was the operating headquarters of the 48th VC Battalion and that there also might be additional supporting units. They were informed that the occupying enemy force was well motivated, well armed and might out number American forces. They were further informed that My Lai 4 was a fortified hamlet with well defined and prepared trenchs, bunkers, tunnels and other similar fortification. The evidence also tends to indicate that a heavy engagement was expected with losses of American personnel to be expected. There is further evidence tending to indicate that upon entering the village, there was a fairly heavy volume of weapons fire, habitations were burning and civilians of both sexes and all ages were seen in the hamlet. In addition, there is evidence tending to indicate that at least in the early part of the mission, gun ships were firing in the area. The hamlet was very smoky, densely wooded and bamboo was crackling in addition to the firing of weapons. That it was common knowledge that the enemy more often than not wore no distinctive uniform and that women and children often actively assisted the Viet Cong and North Vietnamese Army soldiers and inflicted injuries and death upon American personnel. Also that the members of Company C had received no training in those circumstances when an order was to be disobeyed but

had been trained that they must obey all lawful orders.

The evidence also indicates that the order was considered by some to be different from past operation orders. That soldiers in Viet Nam are required to undergo some degree of training in the Geneva conventions and follow the rules of engagement when in combat in free fire zones. The evidence tends to show that upon landing in the area to the west of My Lai 4 and the 1st and 2d Platoon forming on line, that no hostile fire was detected. Upon approaching and entering the village, still no hostile fire was encountered. That no casualties resulted during the operation in My Lai 4 as a direct result of enemy-originated fire. That when the members of the accused's platoon entered the village many civilians were observed in the village though no civilians other than NVA, VC or VC and NVA sympathizers had been anticipated. These civilians were composed of males and females of all ages from old persons to children and babes in arm. That these persons were in some instances running about but in other instances were standing passive and still in groups. There is evidence that these persons were offering no resistance and seemed friendly and that no persons in the village were observed to be armed. There is also evidence tending to indicate that there were American soldiers who declined to fire upon the Vietnamese persons. You should consider all these facts and any others I may not have mentioned that you recall as pertains to a person of ordinary sense and understanding who under the same or similar circumstances would know that the order was illegal.

To place this instruction in proper context, you must apply this situation and this understanding particularly to that place and point of time where the evidence tends to show that several soldiers allegedly were on line at a point in the north central sector of the village and came upon a group of more or less from 5--6 to 15 Vietnamese persons

in a clearing near a hut comprised of males, females, children and infants. That these persons were unarmed, acting in a friendly manner and offered no resistance to the American soldiers. That after a brief pause, one soldier called to clear the area to the rear of the group preparatory to opening fire. That immediately thereafter, the group of soldiers opened fire.

As I have indicated, in considering this evidence, you are instructed that an order is manifestly unlawful, if, under the same or similar circumstances, a person of ordinary sense and understanding would know it to be unlawful. If you are satisfied beyond a reasonable doubt that the order allegedly given in this case was manifestly unlawful, then obedience of that order is no defense. The burden is upon the government to establish the guilt of the accused by legal and competent evidence beyond a reasonable doubt. Consequently, unless you find beyond a reasonable doubt that the order given to the accused in this case was manifestly unlawful as I have defined that term, you must acquit the accused unless you find beyond a reasonable doubt that the accused had actual knowledge that the order was unlawful or that obedience of that order would result in the commission of an illegal and criminal act.

The fact that the law of war has been violated pursuant to an order of a superior authority, does not deprive the act in question of its character as a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not have been expected to know that the act ordered was unlawful.

In considering the question whether a superior order constitutes a valid defense, the court must take into consideration the fact that obedience to lawful military orders is the sworn duty of every member of the armed forces; that the soldier cannot be

expected in conditions of war discipline to weigh scrupulously the legal merits or the orders received and that certain rules of warfare may be controversial.

Thus a subordinate is not criminally liable for acts done in obedience of an unlawful order which is not manifestly unlawful on its face, unless the subordinate has actual knowledge of the unlawfulness of the order or the unlawfulness of its demands. In the absence of such knowledge the subordinate must be considered duty bound to obey the order and he cannot properly be held criminally accountable for acts done in obedience to what he supposed to be a lawful order.

Again I repeat, if you are not satisfied beyond a reasonable doubt that the order was manifestly unlawful, as I have defined that term, you must acquit the accused of the specification and charge which alleges acts done in compliance with that order, unless you are satisfied beyond a reasonable doubt that the accused had actual knowledge that the order was unlawful or that obedience of that order would result in the commission of a criminal act.

In the latter part of this instruction I have referred to knowledge or lack of knowledge on part of the accused. In this regard, knowledge on the part of the accused, like any other fact may be proved by circumstantial evidence, that is, by evidence of facts from which it may be justifiably inferred that the accused had such knowledge. In this regard you may consider all relevant facts and circumstances that have been presented to you during the course of this trial. I will again call to your attention the summary of evidence pertaining to the tactical situation and pressures upon the soldiers of C Company prior to and during the incident at My Lai 4. These factors are significant in a consideration of the knowledge of the accused as to the legality of

the order only insofar as you are satisfied that he was aware of these facts, a determination you should make based upon your own training, experience and common sense. I will not again recite that summarization. In addition to these facts you should consider evidence that indicates that the accused was participating in his first search and destroy mission, as such; that he was a naive young man of approximately 20 years of age, that he has an intelligence quotient of 111, which places him in the high average to bright normal; that he quit school in the eighth grade, that he had been trained to obey orders, that Captain Medina was a strict disciplinarian and held in high regard by members of his command, that other soldiers in his presence fired weapons in addition to the accused at the group of Vietnamese; that he understood from Captain Medina's briefing that everything in the village was communist but did not recall Captain Medina saying to kill all the people in the village or to burn the village. That he didn't recall anything different or unusual about the briefing except it was the first search and destroy mission of the unit; that he recalled Captain Medina said it was a chance to get even with the VC for some of the casualties that the company had already had; that his impression was that everybody in the village was to be shot; that upon arrival at the landing zone he remembered gun ships firing but he did not know the targets; that as he approached the village he was just firing for recon and not at anything in particular. As the squad got to the outskirts of the village an order was given to destroy all the food, kill all the animals and kill all the people; that he saw Vietnamese running for cover and trying to hide when the company opened upon the villagers and began to kill them; that the accused characterized this shooting by stating "It was murder." That he was shooting into houses, shooting at people running or people just standing and doing nothing; that the accused exchanged his M-60 for a M-16 because he wasn't happy about shooting all

the people anyway; that they didn't collect any people and didn't try to capture anyone; that he didn't agree with all the killing but he was doing it because he had been told to do it; that while he didn't approve of all the killings, he did because he was ordered to do it; that he thought all the people were shot because Captain Medina had told them that all the villagers were communist.

Again, gentlemen, perhaps I have not recalled all the evidence pertaining to the accused's age, education, experience, training and opportunity to know relevant facts. I caution you not to rely upon my summarization of this evidence but your own independent recollection of the evidence.

The weight, if any, to be given an inference of the accused's knowledge, must of course, depend upon the circumstances attending the proved facts which give rise to the inference, as well as all the other evidence in the case. It is for you to make this determination.

The burden is upon the prosecution to establish the guilt of the accused by legal and competent evidence beyond a reasonable doubt. Consequently, you must acquit the accused of any offense committed in obedience to an unlawful order unless you are satisfied by the legal and competent evidence beyond a reasonable doubt either that

(a) The order was manifestly unlawful; that is, that a person of ordinary sense and understanding under the same or similar circumstances would know it to be unlawful, or that

(b) The accused knew at the time of his act, that the order given him to kill all the inhabitants, kill the animals, destroy the food, but particularly to kill all the inhabitants, was unlawful under the circumstances or that obedience of that order would result in the commission of a criminal act.[85]

In a subsequent interview, Colonel Howard stated to the writer that while he had ruled that the order in question was illegal, he had after labored consideration, stopped short of ruling that it was manifestly so, even though it was his opinion that such an extreme ruling as to the latter point would have been supportable at the appellate level (c.f., United States v. Schultz, supra).

In the case of United States v. Calley,[86] the accused, a platoon leader and first lieutenant, testified that Captain Medina, at the company briefing, instructed the company to unite, fight together and become extremely aggressive. The people in the My Lai area were, he allegedly stated, the enemy and were to be so treated. My Lai 4 was to be neutralized completely; the area had been prepped by "psy war" methods; all civilians had left the area; everything in the village was to be destroyed during a high speed combat assault; and no one was to be allowed to get in behind advancing troops. Other villages through which they would be maneuvering enroute to the primary assault were to be treated in the same manner. Further, Lieutenant Calley testified that while he was in the village of My Lai 4 on the eastern side, he twice received orders from Captain Medina: first, to "hurry and get rid of the people and get into the positions that he was supposed to be in," and, thereafter, to stop searching the bunkers.

He was to "waste the people". (Captain Medina denied giving any such orders.) Arising out of the military operations which took place the next day, 16 March 1968, during which, according to the accused, he and his platoon were acting pursuant to those orders, was the famous court martial proceedings wherein Calley was accused of the premeditated murder of not less than 102 oriental human beings. Colonel Reid W. Kennedy, JAGC, U.S. Army, served as Military Judge during these proceedings.

With respect to the defense of superior orders, Colonel Kennedy, after ruling that as a matter of law an order directing the accused to kill unresisting Vietnamese within his control or within the control of his troops, was illegal went on to state:

> The question does not rest there, however. A determination that an order is illegal does not, of itself, assign criminal responsibility to the person following the order for acts done in compliance with it. Soldiers are taught to follow orders, and special attention is given to obedience of orders on the battlefield. Military effectiveness depends upon obedience to orders. On the other hand, the obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent, obliged to respond, not as a machine, but as a person. The law takes these factors into account in assessing criminal responsibility for acts done in compliance with illegal orders.
>
> The acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior's order is one which a man of ordinary sense and understanding would,

under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful.

Knowledge on the part of any accused, like any other fact in issue, may be proved by circumstantial evidence, that is by evidence of facts from which it may justifiably be inferred that Lieutenant Calley had knowledge of the unlawfulness of the order which he has testified he followed. In determining whether or not Lieutenant Calley had knowledge of the unlawfulness of any order found by you to have been given, you may consider all relevant facts and circumstances, including Lieutenant Calley's rank; educational background; OCS schooling; other training while in the Army, including Basic Training, and his training in Hawaii and Vietnam; his experience on prior operations involving contact with hostile and friendly Vietnamese; his age; and any other evidence tending to prove or disprove that on 16 March 1968, Lieutenant Calley knew the order was unlawful. If you find beyond reasonable doubt, on the basis of all the evidence, that Lieutenant Calley actually knew the order under which he asserts he operated was unlawful, the fact that the order was given operates as no defense.

Unless you find beyond reasonable doubt that the accused acted with actual knowledge that the order was unlawful, you must proceed to determine whether, under the circumstances, a man of ordinary sense and understanding would have known the order was unlawful. Your deliberations on this question do not focus solely on Lieutenant Calley and the manner in which he perceived the legality of the order found to have been given him. The standard is that of a man of ordinary sense and understanding under the circumstances.

Think back to the events of 15 and 16 March 1968. Consider all the information which you find to have been given Lieutenant Calley at the company briefing, at the platoon leaders' briefing, and during his conversation with Captain Medina before lift-off. Consider the gunship "prep" and any artillery he may have observed. Consider all

> the evidence which you find indicated what he could have heard and observed as he entered and made his way through the village to the point where you find him to have first acted causing the deaths of occupants, if you find him to have so acted. Consider the situation which you find facing him at that point. Then determine, in light of all the surrounding circumstances, whether the order, which to reach this point you will have found him to be operating in accordance with, is one which a man of ordinary sense and understanding would know to be unlawful. Apply this to each charged act which you have found Lieutenant Calley to have committed. Unless you are satisfied from the evidence, beyond reasonable doubt, that a man of ordinary sense and understanding would have known the order to be unlawful, you must acquit Lieutenant Calley for committing acts done in accordance with the order.

Colonel Kennedy, in effect, instructed the court members to consider the defense of superior orders unless it were found beyond a reasonable doubt that the accused was not proceeding pursuant to orders in his actions on 16 March 1968. Should such doubt remain, the court members were to move on to the knowledge test as to the orders to kill the unresisting occupants of My Lai 4. Such knowledge could be inferred, considering all the relevant facts and circumstances.

Unless the subjective knowledge of the illegality of the order was found beyond a reasonable doubt, the court was instructed to proceed to determine whether, under the circumstances (which he again reviewed to the court members) a man of ordinary sense and understanding would have known that the order was illegal. It should be noted that, in

this case, the two foregoing tests were to be applied by the finders of fact, rather than to have been adjudged as a matter of law unfavorably to the accused.

On 29 March 1971, the accused was found guilty of the premeditated murder at least 22 of the 102 Vietnamese, and guilty of assault with intent to kill one other, a child.

With respect to the present American law on the subject of superior orders as a defense, we can draw several conclusions. Obedience of an illegal order can be a defense per se in some instances. However, assertion of the principle as a defense by an accused charged with committing a criminal act pursuant to such orders fails if either one of two situations is proven beyond reasonable doubt. One is that in which the accused had a subjective knowledge that the order which he obeyed was unlawful. The other is, an objective test based on the content of the order and the circumstances under which it was given. At this point, there appears to be a divergency of opinion as to just what this test requires. One version of the test is that if the order was plainly unlawful to a person of ordinary sense and understanding, the plea fails. This is the version expressed in Commonwealth ex rel. Wadsworth v. Shortall, supra; United States v. Figueroa, supra; United States v. Griffen, supra; the present Manual for

Courts Martial, supra; and the foregoing model instructions. Another version is that stated by Judge Ferguson, in United States v. Miles, supra, as he quotes Winthrop,' requiring that the illegal order be "so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness" and that "except in such instances of palpable illegality, which must be of rare occurrence, the inferior should presume that the order was lawful and authorized and obey it accordingly" and, also, in quoting United States v. Clark, requiring that the order be "a plain case of excess authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal" in order for the defense to fail on this theory. Judge Ferguson requires this standard in order to find a required mens rea on the part of the accused. It would appear that the latter test would perhaps require a higher degree of "plainness" of the illegality of the order, based on the difference in the wording alone. This difference would be reflected in the impact on a court of lay members receiving the respective wordings in instructions from the military judge, or any jurors being instructed by a trial judge. But the divergence becomes even more apparent with respect to whether we should apply the understanding of a person of ordinary sense and understanding, or one with

the "commonest" understanding that the order was unlawful. While the latter phrase appears somewhat archaic and ungrammatical, it conveys to the writer that it includes those persons at the lowest end of the scale of intelligence and experience in the services, i.e., one having something less than "ordinary sense and understanding". This would appear to be buttressed somewhat by Judge Ferguson's discussion of the requirement of mens rea. A guilty mind would not exist in a person of less than ordinary understanding who did not perceive the illegality of an order, even though such illegality might have been palpably apparent to a person of ordinary understanding. The same wording, supporting the latter version, was used in In re Fair, supra.

In the middle ground, we find the wording in United States v. Kinder, which uses the expression "such orders are manifestly beyond the scope of the issuing officers authority and so palpably illegal on their face", but applies this to "a man of ordinary sense and understanding".

E. Conclusion

1. We have examined the various applications of the principle of superior orders, and a number of conclusions can now be drawn. First of all, history reveals that persons tried during or immediately after hostilities,

in courts formed under the auspices of their present or former enemies have been notably unsuccessful in attempting to assert the defense of superior orders. From Breisach to post Civil War Washington to Nuremburg, the treatment has been almost uniformly an adherence to the principle of les baionettes intelligentes, or, as a non French-speaking person might somewhat facetiously label it, the "Goebbels Doctrine" (c.f., the statement made by Goebbels in connection with the massacred Allied pilots in 1944, supra). Only to a small extent, perhaps, did the Nuremburg Tribunal stray from the "Goebbels Doctrine", which was, in effect, the principle demanded in the preliminary negotiations by the Soviet representatives. This slight variance may be found in the enigmatic "moral choice" rule. And only to a slightly greater extent, and then only in theory rather than in application, did the Tokyo Tribunal depart from that extreme rule. One may easily note the contrast in moving on to the Leipzig trials and the various American cases, in which under the rules and theories discussed, obedience to superior orders could sometimes serve as a defense per se. One could theorize interminably as the reasons for the discrepancy. The most obvious is that even courts of law can succumb to national and human desires for revenge or reprisal. Whether this is ever justifiable, even in the case of the Nazi leaders, is a matter for

conjecture. But the factor cannot be ruled out. In speaking of the defense of ex post facto law, the interposition of which was attempted at Nuremburg and Tokyo by defense counsel, Schwarzenberger sheds some light on this conclusion:

> In order to see the issue in a proper perspective, it is necessary to keep in mind the root and meaning of war crimes jurisdiction. Its root is reprisal and its meaning is authority, on this basis, and, therefore, by international law, to exercise an extraordinary form of State jurisdiction. To describe war crimes as if they were based on rules of a substantive international criminal law merely leads to confusion.
>
> The real problem is whether the victors were entitled to extend as they did their policies of reprisal and, for this purpose, ignore the tenet of legal policy that it is advisable to avoid retrospective legislation.
>
> The short answer to this counsel of perfection is that the Powers which were responsible for the organization of the Nuremburg and Tokyo trials did not purport to deal with individual infractions of international law committed by their enemies. One or the other of the victorious nations, too, might have committed this or that aggressive act. The manner in which some of the victors treated groups and classes of their own subjects might have left much to be desired or fallen below the minimum standard of international law applicable to foreign nationals. It might even have happened that members of their own armed forces had committed individual war crimes which ought to have found, and did not find, condign punishment.
>
> What the totalitarian aggressors had done was of a different dimension: They had developed aggression into a system, defied the most primitive canons of humanity in a deliberate assault on civilization and committed

> war crimes on a scale and with a brutality symptomatic of an even deeper malaise: the conscious relapse of nations which had emerged long ago from primordial savagery into a state of mechanized barbarism.[87]

Obviously, rules formulated by such courts dealing in reprisal should be carefully scrutinized before applying them in American courts, military or civilian, trying members of the American military services.

With respect to the defense of superior orders, the writer is of the opinion that the principles applied at Nuremburg, Tokyo, by the other international tribunals, and by national courts, including even our own, in trying a present or former enemy national, are inapplicable in American courts trying Americans. The American case-law and scholarly commentary, although the body of it is not large, should receive the primary consideration. Another series of decisions which might be considered are those rendered by the Leipzig court, for in that situation there was a balancing of interests. The German Weimar Republic was attempting to be cordial to the Allied powers, and yet was the successor of the Imperial German Government. Its leaders did not wish to antagonize the German people in trying former soldiers and sailors because of obvious popular sentiment; yet they were aware that if they did not mete out punishment to the defendants to a satisfactory degree, the Allied powers might exercise their option under

the Versailles Treaty to regard the trials as a nullity and proceed to try anew all of the actual defendants, along with any others which they might desire. Considering all of these pressures, the rules of law which emerged with respect to the defense of superior orders are amazingly sound and warrant consideration by American courts.

What rules and standards with respect to the defense of superior orders should now be applied in our courts? In reading the daily newspapers, it appears quite obvious that public policy would demand such rules be applied as would not be adverse any more than is absolutely necessary in their effect on discipline and morale in our Armed Forces. The undisciplined and morally unready condition of the French Army of 1940 must be avoided in the American military forces. No principles of law less favorable to an accused with respect to superior orders than those set forth in the previous American cases and other American sources should now be adopted.

2. The writer would suggest the following in the way of instructions to be given by military or civilian judges to the finders of fact in future cases involving the plea of superior orders:

> My ruling (your determination) that the order issued by _____ was unlawful does not in itself determine whether or not the accused is criminally responsible for acts

done in compliance with that order. Acts of a subordinate, in compliance with his supposed duty or orders are justifiable or excusable and impose no criminal liability unless the accused knew the order to be unlawful. In the absence of such knowledge the subordinate must be considered duty bound to obey the order and he can not properly be held criminally accountable for acts done in obedience to what he supposed to be a lawful order.

Knowledge on the part of the accused, like any other fact may be proved by circumstantial evidence, that is, by evidence of facts from which it may be justifiably inferred that the accused had such knowledge. You may but are not required to infer such knowledge if it is manifestly apparent and palpably clear to a person of ordinary sense and understanding that the order was unlawful. In this regard as to the inference of such knowledge on the part of the accused you may also consider all other relevant facts and circumstances including but not limited to (specify significant evidentiary factors bearing upon knowledge, including the accused's age, education, experience, training and opportunity to know relevant facts, and all of the facts surrounding the incident itself and the possible effects that the stress of the moment may have had on the judgment and understanding of the accused when he made the decision to obey the order). The weight, if any, to be given an inference of the accused's knowledge must, of course, depend upon the circumstances attending the proved facts which give rise to the inference, as well as all the other evidence in the case. It is for you to make this determination.

The burden is on the prosecution to establish the guilt of the accused by legal and competent evidence beyond a reasonable doubt. Consequently, you must acquit the accused of any offense committed in obedience to an unlawful order unless you are satisfied by the legal and competent evidence, beyond a reasonable doubt, that the accused knew at the time of his act, that the order given him to

_____ was unlawful under the circumstances.

The above approach to the issue of superior orders would be similar to the approach of the Leipzig court in that it would allow only one instance in which this principle would not serve as a defense, i.e., that in which the accused knew that the order was unlawful. However, the objective manifest, palpable illegality test, so prominent in the American cases in which the issue arose, would be preserved as a means by which an inference of such knowledge could be drawn. Although this objective test would now be couched in terms of the person of ordinary sense and understanding, the inference would not be binding on the triers of facts, for the other relevant facts and circumstances could be considered to rebut the inference if it appears that the accused possessed a degree of sense and understanding less than "ordinary", or as an independent basis for such an inference if appropriate. Such a test would undoubtedly square with the mens rea and specific intent requirements espoused by Judge Ferguson and Doctor Dinstein.

Some may suggest separate tests to be applied to separate ranks or grades of individuals, i.e., one test for the general and another for the private. But at what intermediate grades would we apply the differential? Should the nineteen year old Reserve second lieutenant with perhaps

less than a year of service be held to a higher standard of accountability than the sergeant major with many years of service and experience? Separate tests arbitrarily applied would be manifestly unfair. It is submitted that the writer's proposed instruction would take these matters into account on an individual, case by case basis, insuring fairness to all.

Lastly, such a test should preserve a proper balance between the interests of military discipline and those of the law that the interests of both may be preserved in future cases.

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FOOTNOTES

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